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Supreme Court of the United States.

OCTOBER TERM 1921.

Nos. 258, 288.

CONSOLIDATED GAS COMPANY OF NEW YORK,
Complainant-Appellant,

against

CHARLES D. NEWTON, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK; EDWARD SWANN, AS DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK; AND LEWIS NIXON, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, FIRST DISTRICT,
Appellees.

BRIEF FOR APPELLANT.

SHEARMAN & STERLING,
Solicitors for Appellant,
55 Wall Street,
New York.

JOHN A. GARVER,
of Counsel.

[illegible] Post and Publicity Office, Inc., 124 Fulton St., N. Y.

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CONSOLIDATED GAS COMPANY OF NEW YORK,
Complainant-Appellant,

AGAINST

CHARLES D. NEWTON, as Attorney General of the State of New York; EDWARD SWANN, as District Attorney of the County of New York; and LEWIS NIXON, constituting the Public Service Commission of the State of New York, First District,
Appellees.

BRIEF FOR APPELLANT.

Statement.

No. 258 is an appeal by the Consolidated Gas Company, the complainant below, from certain conditional provisions contained in a final decree of the District Court of the United States, for the Southern District of New York, dated August 4, 1920, as amended August 11, 1920, entered upon the direction of his Honor, Judge Learned Hand, District Judge.

NOTE: Unless otherwise indicated, the references are to the "print" page of the record in No. 258.

No. 288 is an appeal from similar provisions contained in the final decree, as further modified by the same Judge on February 28, 1921.

The present suit was instituted in January, 1919, to have a statute (L. 1906, ch. 125) declared confiscatory and void as to the complainant, which fixed a maximum charge of eighty cents per thousand cubic feet for gas supplied by the complainant to its consumers; and, as an incident to this relief, the Court was asked to enjoin the public authorities from seeking to enforce the Act or the penalties prescribed for its violation.

By the Public Service Commissions Law, passed in 1907 (L. 1907, ch. 429), a copy of which, as it existed at the time of the trial, is submitted herewith, very full regulatory powers over public utilities, including gas companies, were conferred upon the Public Service Commission. An important limitation, however, was placed by the Legislature upon the power of the Commission to fix gas rates, as Section 72 of the Law provided that the maximum rate prescribed should not exceed that fixed by statute. The language of the Section on this point was as follows:

> "After a hearing and after such an investigation as shall have been made by the Commission . . . the Commission, within lawful limitations, may, by order, fix the maximum price of gas or electricity, *not exceeding that fixed by statute*, to be charged by such corporation or person for the service to be furnished."

This limitation necessitated resort by the Gas Company to the courts for relief from the eighty cent rate previously established by the Legislature.

A reference was directed to Abraham S. Gilbert, Esq., as Special Master, to take the evidence and report it with his findings and recommendations to the Court. Upon the Master's report, the case came on for final hearing before Judge Hand, who, after resolving every doubt against the complainant (pp. 110, 112), found that the rate was confiscatory, in that it did not allow a return of more than 3% per annum, and possibly of not more than 1½% per annum, on the minimum value of the tangible property employed in the business (p. 112). He, therefore, concluded that the statutory rate had become unfair and violated the complainant's constitutional rights under the Fourteenth Amendment; and he stated the inevitable consequence of this conclusion as follows (p. 112):

> "The defendants must be restrained, for the present, from enforcing it, and such a decree will pass."

Such a decree, however, did not pass. The Court departed from the usual practice of settling the form of the decree on notice, and entered its own decree, which was filed on August 4, 1920, with the opinion (pp. 114, 116), without passing upon the findings of the Master, the requests to find, or the exceptions taken to the findings or refusals to find.

This decree, moreover, totally failed to adjudicate upon the sole issue that was involved in the case, namely, the confiscatory character of the statute; and, without such adjudication, the Court proceeded to continue the preliminary injunction previously granted by the Statutory Court, which restrained the defendants from attempting to enforce the statute (p. 115). As a condition, however, of continuing the injunction, the Court inserted a pro-

vision that, until March 1, 1921 (a period of seven months), or until an earlier promulgation by competent State authority of a different rate, the complainant should not charge more than $1.20 per thousand cubic feet for its gas, although, in deciding the case, Judge Hand did not deem it necessary to base his conclusion upon full values but only upon approximately the minimum figures claimed by the defendants; and in his opinion (bottom of p. 110), he stated that the method of valuation adopted in deciding the case "might be improper if a rate were to be fixed" and (p. 112) that "it would be most unfair to accept any of these figures in fixing a rate".

As a further condition of continuing the injunction, the complainant was required to deposit with another Special Master all sums received in excess of eighty cents per thousand; and the Master was directed to distribute this fund in accordance with any rate thus fixed prior to March 1, 1921; so that, if such rate should be less than $1.20, the difference would have to be returned to the consumers (p. 160).

The inadvertence of the Court in the entry of this decree is further observable in the provision for impounding all sums in excess of seventy-five cents collected from the City of New York (bottom of p. 115), although the separate statute (L. 1905, Ch. 736) in which that charge was made, had not been attacked in the present litigation.

Upon the application of the parties, a hearing was immediately given upon the form of the decree. This resulted in the amended decree of August 11, 1920, from the conditional provisions of which the complainant has appealed (No. 258). In this amended decree, the Court undertook to pass upon

the findings of the Special Master (p. 122); and it also expressly adjudicated that the statute was confiscatory and void (p. 122). The injunction, however, was still made conditional upon a maximum rate of $1.20, with an impounding provision as to all sums collected in excess of the eighty cent rate prior to March 1, 1921, or the earlier establishment of a rate by State authorities. Such rate, when fixed, was not only made retroactive as to sums collected under permission of the final decree; *but the Court went a step further, and made it applicable to all sums in excess of eighty cents* a thousand, collected during the pendency of the action under the preliminary injunction granted by the special Statutory Court (p. 124, sub. 14).

No. 288.

The situation thus established continued until nearly the end of the seven months' period specified, when the defendants applied to the Court (p. 2) for a modification of the final decree, by providing that the maximum limit of $1.20 should be continued "until the promulgation of a gas rate applicable to the plaintiff by some competent authority of the State"; that is, indefinitely.

This motion was vigorously opposed; and affidavits were submitted by the complainant which brought the result of its operations down to February 28, 1921 (pp. 3-31), and showed conclusively that the cost of operating the Company's business had increased to such an extent, since the entry of the original decree in August, 1920, that a rate of $1.20 was not sufficient to pay even the actual operating expenses of the business (p. 13), and,

NOTE: The references in the remainder of the statement are to the record in No. 288.

consequently, allowed no return whatever upon the value of the property employed in the business; and the serious consequences of continuing the injunction upon the condition of limiting the rate to $1.20 (which had already proved confiscatory) were pointedly called to the attention of the Court (p. 18).

The application of the defendants for this indefinite extension of time was denied; and the complainant was left free to establish an adequate rate, but only upon the retroactive conditions previously laid down for the impounding and the subsequent distribution by the Master between the Company and its consumers of everything collected by complainant in excess of eighty cents per thousand, if the State authorities should, within three months after the determination of any appeal taken from the decree, establish a different rate from that charged by the complainant.

From the decree of February 28, 1921, thus modifying the amended decree of August 11, 1920, the complainant has also appealed (No. 288).

Erroneous character of decree.

The Court exceeded its power, after adjudging the statute to be confiscatory and void, in making the injunction conditional upon the acceptance by complainant of a maximum rate fixed by it for the future, in impounding all sums collected in excess of eighty cents per thousand and in subjecting this fund retroactively (including the fund accumulated *pendente lite*) to distribution between complainant and the consumers in accordance with any rate that might subsequently be established by the state authorities.

POINTS.

FIRST.

Effect of adjudication that statute invalid.

In adjudging the statute confiscatory as to the complainant, the Gas Company was, of course, no longer limited to the charge of eighty cents; and it should have been left free to initiate and put in force any rate that it deemed reasonable.

Morrell *v.* Brooklyn Borough Gas Co. No. 1 (July 14, 1921), 231 N. Y. 398.

This right of the Company, after decree, to intiate a new and adequate rate, at a figure higher than the previous statutory limitation, was, of course, subject to the power of the Public Service Commission to regulate and revise any rate so initiated, and lower it if too high.

Morrell *v.* Brooklyn Borough Gas Company, No. 1, *supra*.

The Appellate Division of the New York Supreme Court had reached the same conclusion prior to the entry of the final decree in the present case.

Bronx Gas Co. *v.* Public Service Commission, 108 Misc., 180.

SECOND.

Recent amendment of Public Service Commissions Law.

Since the entry of the decree in this case, the Public Service Commissions Law has been substantially amended (L. 1921, Ch. 134). Among these amendments, is one of Section 72, lifting the ban previously placed upon the Commission and giving the Commission full power to fix any rate that it may deem reasonable, even though it be in excess of the eighty cent rate established by the act of 1906, which still remains on the statute book. The provision in Section 72, heretofore quoted (*ante*, p. 2), was amended so as to read as follows:

> "After a hearing and after such an investigation as shall have been made by the Commission . . . the Commission may, by order, fix just and reasonable prices, rates and charges for gas or electricity to be charged by such corporation or person for the service to be furnished, *notwithstanding that a higher or lower price has been theretofore prescribed by general or special statute*, contract, grant, franchise condition, consent or other agreement."

This amendment took effect on March 30, 1921; and the result of it was to enable the Commission to regulate rates for gas companies even when the rate it might deem reasonable should be in excess of eighty cents.

THIRD.

Possible disastrous consequences of the retroactive feature of the decree.

At all times since the entry of the final decree, the Legislature has been free to establish a lower rate than the $1.20 maximum therein established by the Court, or than the rate established by complainant since the entry of the modified decree of February 28, 1921; and the Commission has also had this power since March 30, 1921, when the amended Public Service Commissions Law took effect. Under the decree as amended on February 28, 1921, if this power is exercised before the expiration of three months after the decision of this Court upon the present appeal, the rate then established becomes retroactive to the date of the preliminary injunction. It is quite possible, therefore, if the retroactive feature of the decree should stand, that much of the advantage gained by the complainant as the result of this prolonged and costly litigation may be lost.

I. The record in No. 288 shows clearly the disastrous effect of the $1.20 limitation prescribed in the amended decree of August 11, 1920; because, the rapidly mounting costs subsequent to that date made even a $1.20 rate confiscatory, in depriving the Company of any return whatever upon any of its property (p. 13).

II. If, owing to a substantial reduction in operating costs, the Commission should, at any time hereafter within the three month period, conclude that a rate of $1.10 or $1 would be reasonable for the future, then, even if such rate might previously

have been absolutely confiscatory (and as to this there is no doubt; *supra*), the Company would, under the form of the amended and modified decrees, be deprived of everything previously collected in excess of the rate thus fixed, although the Commission would actually be legislating only for the future.

III. The action of the Statutory Court in granting a temporary increase in the rate, *pendente lite*, may be nullified. That rate was not intended to yield an adequate return but only to enable complainant to collect an amount in excess of the eighty cent rate sufficient to tide it over the period which would elapse pending a final decree in the District Court. To the fund thus allowed, the complainant was absolutely entitled, in case it should succeed in having the statute declared void. But the action of the lower Court in making the retroactive feature of the conditional provision applicable to that rate (Record 258, p. 124, sub. 14) may deprive the Company of the fund thus obtained. The effect of this would be to enable a single District Judge to annul a decision made by the three Judges who constituted the Statutory Court.

IV. The further consequences may be even more disastrous, owing to the longer period covered. The New York Legislature meets in annual session on the first of January (N. Y. Cons., Art. X, Sec. 6); and special sessions may be called by the Governor at any time (N. Y. Cons., Art. IV, Sec. 4). It has, therefore, been possible, ever since the entry of the final decree herein in August, 1920, for the Legislature to establish a rate slightly in excess of the eighty cent rate, with the result that

the complainant may be deprived of the entire amount impounded for its protection. It has thus been within the power of the Legislature to nullify the decree of the Court, by establishing a rate which would clearly be confiscatory on the basis of the Court's findings. This power it still possesses. It may conceivably establish a rate of $1, or 90 cents, or even of 81 cents; whereupon, the Special Master, who holds the impounded fund, would be obliged, as the decree now stands, to pay over to the consumers all sums heretofore or hereafter collected in excess of such confiscatory rate.

It is no answer to this possibility to say that the Legislature will not do anything so ill-advised or so clearly disregardful of the ordinary administration of justice. A legislature is capable of anything, which has so obviously been influenced heretofore by political considerations rather than by a regard for undisputed facts. What can be expected of a legislature which passed an omnibus Act in 1906, establishing a rate of eighty cents, which the lower courts, on the experience of 1905, held to be confiscatory (157 Fed., 849) and which this Court held (212 U. S., 19) to be close to the line of confiscation; a legislature which refused to modify the statute in spite of the startling economic changes brought about by the world war, and which shut its eyes to obvious facts known of all men; a legislature so blind and obdurate that, in creating a Public Service Commission, in 1907 (L. 1907, Ch. 429), at great expense to the taxpayers, and conferring upon it powers so extensive as almost to deprive the directors of corporations of the ordinary rights of business management, nevertheless withheld from that Commission the only power which would have enabled it to avert general bankruptcy and demoralization of service, unless

the companies resorted to the slow and costly relief to be gained by an appeal to the courts! And, if at the end of the litigation, the Court, without due consideration of the facts, itself establishes a retroactive rate, as in the present case, even this last refuge is taken away from the companies.

FOURTH.

Arbitrary character of the retroactive condition.

The sole issue in this case was whether an eighty cent rate afforded the complainant an adequate return upon the reasonable value of its property devoted to the public use. Throughout Judge Hand's opinion, this issue is steadily recognized; and, as heretofore pointed out (*ante*, p. 4), he consistently confined himself to minimum figures in reaching the conclusion that the eighty cent rate was confiscatory. The complainant made no effort to give evidence of full value. For instance, in the case of its real estate, it accepted the assessed value placed upon the property for purposes of taxation. Such value, as this Court observed in Cummings *v.* National Bank (101 U. S., 153, 162) is well known not to be the full value. The Court below, therefore, did not have before it the facts upon which a reasonable rate could be predicated; and it expressly acknowledged this in its opinion, when, in referring to its attitude to cut down all assessments of value to the lowest possible figures, it said (p. 112):

> "It would be most unfair to accept any of these figures in fixing a rate. . . . It would

> be the height of injustice, if, in view of that attitude, its conclusions so reached were treated as a fair basis for fixing a new rate."

And yet, in spite of all this, the Court did fix a limit of $1.20 upon the rate to be charged by the complainant, and made any rate less than that, which might subsequently be established by State authority, retroactive.

FIFTH.

No power to annex conditions to the adjudication of invalidity.

I. When the Court below found that the Act was confiscatory and void as to the complainant, it was bound to enter a decree accordingly; and, as heretofore stated (*ante,* p. 3), Judge Hand recognized this necessary consequence in his original opinion (p. 112). The statute thereupon ceased to exist, so far as the complainant was concerned. Any attempt thereafter on the part of the State officials to enforce its provisions, or the penalties prescribed for its disregard, would have been defeated by pleading the decree which was duly entered in a suit to which these officials had been parties. Injunctive relief was, consequently, not essential for the protection of the complainant; but, because such relief is appropriate in actions of this kind, in order to protect the complainant from possible annoyance and vexatious attacks, the courts invariably grant it.

II. The injunction was a mere corollary to the main relief. The Court had no more power to

make the injunction conditional than it would have had, after finding the rate confiscatory, to refuse to enter a decree accordingly except upon the condition of establishing a maximum rate itself instead of the confiscatory legislative maximum.

SIXTH.

No legislative power in the courts.

That the establishing of rates for public utilities is a legislative function and that the courts cannot encroach upon it, are propositions so elementary as to require no citation of authorities in this tribunal. As, however, the Court below disregarded the fundamental distinction between judicial and legislative powers, counsel may be pardoned for referring to a few of the decisions on the subject:

Int. Com. Comm. *v.* Cincinnati, etc., R. Co., 167 U. S., 499;

Norwood *v.* Baker, 172 U. S., 269, 293;

McChord *v.* L. & N. R. Co., 183 U. S., 483, 495;

Prentis *v.* Atlantic Coast Line Company, 211 U. S., 210, 226;

Knoxville *v.* Water Co., 212 U. S., 1, 8;

L. & N. R. Co. *v.* Garrett, 231 U. S., 298, 305.

In Int. Com. Comm. *v.* Ry. Co. (*supra*), the Court, in an opinion by Mr. Justice Brewer, said (p. 499):

> "It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act."

SEVENTH.

False analogies and misleading precedents.

I. The Court below was misled by assuming that it had discretionary powers in the entry of the final decree similar to those which are exercised upon applications for preliminary injunctions (p. 119). Obviously, there is no similarity between the two cases.

The application for a preliminary injunction is always addressed to the discretion of the court, for the purpose of protecting a claimant against irreparable injury in case he should finally succeed in establishing his contention. In passing upon such application, in a case of this kind, before there has been a judicial inquiry into the facts, and while, therefore, the statute is still in force and every presumption is in favor of its validity, the court may impose such terms and conditions as it deems advisable. But, when the Court, after a trial, decides the controversy in favor of the complainant, and holds the statute to be void, it must direct the entry of a decree accordingly. It no longer has the power to impose conditions. "It cannot be doubted that, in a clear case of confiscation, it is the right *and duty* of the court to annul the law."

Knoxville *v.* Water Co., 212 U. S., 1, 17.

II. The cases cited by the Court below are as follows:

Walden *v.* Bodley, 14 Pet., 156;
State Railroad Tax Cases, 92 U. S., 575;
Cummings *v.* National Bank, 101 U. S., 153;
Peoples National Bank *v.* Marye, 191 U. S., 272;

1. Walden *v.* Bodley was a case involving the title to real estate, and merely referred to the well known powers of a court of equity in directing such acts to be done by the complainant as were necessary to terminate a litigation of forty years' standing.

2. The remaining three cases cited were tax cases, where the complainant was seeking to set aside an unlawful *excess* in the amount of the tax, but was not complaining of the entire assessment, and where it was undisputed that some portion of the tax was due and payable; and, in Cummings *v.* National Bank, the complainant had voluntarily paid into court the tax which was its true share of the public burden (101 U. S., 163).

In the two remaining tax cases, the question was treated as one of pleading. In Peoples National Bank *v.* Marye, for instance, the appeal was dismissed, on demurrer, because the complainant had failed to show payment or tender of payment of the amount which would be justly due on its own contention. In the State Railroad Tax Cases, the Court said (pp. 616-7):

> "Before they ask equitable relief, they should do that justice which is necessary to enable the court to hear them."

And, again (p. 617):

> "It is not sufficient to say *in the bill* that they were ready and willing to pay whatever may be due. They must *first* pay what is conceded to be due."

In that case, the Court also distinctly said (p. 617) that it had no power to make "a new

assessment on any principle it may decide to be the right one".

In his opinion in the court below, Judge Hand, in referring to these three tax cases, said (p. 119) "that they involved an assessment and levy by the court itself". In this he was clearly in error.

3. On the theory of the Court below, the complainant should have alleged in its bill that it was ready and willing to accept a rate less than the eighty cent rate which it attacked as confiscatory and void, or to accept such other rate as the Court might, in its discretion, establish, in entering a final decree.

4. As we have heretofore seen (*ante*, p. 13), the injunctive relief was a mere incident to the main relief asked for and was not strictly essential for the protection of the complainant's interests. But, in the cases relied upon by Judge Hand, the injunctive relief was the primary relief asked for by the complainant and was absolutely essential for his protection, in order to free his property from a lien which would otherwise constitute a cloud upon his title and prevent him from disposing of the property.

III. Judge Hand recognized that he was interfering to some extent with the rate making powers of the State legislature and that he had no right to do so; but he attempted to justify his action on the ground that what he did was only a slight interference. "I recognize that the condition I have imposed is new, but it seems to me the minimal interference with the functions of the State as the rate-making body" (p. 119).

EIGHTH.

The correct view more recently taken by other judges.

All the gas companies in New York City have been driven into the courts during the past few years, as a result of the antiquated legislative limit placed upon the rates which they were permitted to charge. In every instance, they have succeeded in having the statute declared void. Many of the cases are now pending on appeal in this Court. But, in no single instance, has the injunctive relief contained in the final decree been made conditional in any way, although nearly all of the cases have been decided since the entry of the decree in the present case.

I. In Kings County Lighting Co. *v.* Nixon (268 Fed., 133), Judge Hough, Circuit Judge, in directing judgment in favor of the plaintiff, said (pp. 149-50):

> "It is elementary that the courts cannot make rates; they only pass upon rates after they are made. This Court will not, directly or indirectly, announce, fix or suggest a rate for gas."

This utterance by Judge Hough is so pointed and emphatic that it was evidently inspired by the contrary view previously taken by Judge Hand.

II. In New York and Queens Gas Co. *v.* Newton (269 Fed., 277), Judge Mayer, in declaring a statutory rate of $1 void as to the complainant, said (p. 288):

> "At the outset, however, it is desirable to make clear that this Court is not a rate-making body, and that, on final decree, the question on the pleadings and proof is whether the statutory rate is confiscatory, and, therefore,

> whether the defendant public officers should be enjoined from enforcing it. Questions which might be pertinent where it is sought to fix a rate which shall be as nearly accurate as possible, may prove academic in a case where the basic question is the constitutionality of the statute prescribing the rate."

III. In a suit brought by the Richmond County Gas Company, and decided in January, 1921, the Supreme Court of the State of New York, in declaring the statute confiscatory, refused to fix or limit the rate to be charged (see Record in No. 288, p. 10).

IV. In Bronx Gas and Electric Co. *v.* Commission (108 Misc. Rep., 180), the Supreme Court of New York, at Special Term, said (p. 185):

> "If a law be adjudged invalid, the court may not, in the same decree declaring its invalidity, attempt to enact a law upon the same subject which shall be obnoxious to no legal objections. It is bound to stop with simply passing its judgment upon the validity of the act. It is quite apparent to me that the considerations which inhibit a tribunal from fixing a rate to be charged in the future are equally potent to prevent its effecting the same end through the enjoining power forbidding interference with the rate which it finds to have been sufficient under previous conditions and prices."

While the Appellate Division of the Supreme Court reversed this decision on another ground, it was in complete agreement with the Court below as to the lack of power in the Court to fix a rate, and said (190 App. Div., 13, 19):

> "The power to legislate was never given to the court. . . .
>
> "These delimitations of power must be respected and observed; and when the matter is

> of legislative cognizance, the court should not through any argument of necessity or hardship, arising either from a failure of the legislature to act or from an unwise action on its part, assume the burden of legislation. When the legislature has acted, if it is claimed that it has exceeded its powers, or that the act contravenes the Constitution of this State or of the United States, then a justiciable question arises of which the court unquestionably has jurisdiction, only, however, to pass upon the constitutionality of the act, and not to promulgate by decree an act in its place which the court deems constitutional."

V. In St. Joseph Ry. Co. *v.* Commission (268 Fed., 267), Van Valkenberg, *D. J.*, upon final hearing, held the prescribed maximum rate to be confiscatory and said (p. 269):

> "Of course, the power of this Court is limited to an adjudication upon this point; it being invested with no rate-making power."

NINTH.

The final decree should be amended, by striking out the conditional and retroactive provisions contained in the decree as amended on August 11, 1920, and as further modified on February 28, 1921; and, as thus amended, it should be affirmed, with costs to the appellant.

Washington, October 17, 1921.

SHEARMAN & STERLING,
Solicitors for Appellant.

JOHN A. GARVER,
of Counsel.

FILED
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Supreme Court of the United States.

OCTOBER TERM, 1911

Nos. 1327 and 1328

CONSOLIDATED GAS COMPANY OF NEW YORK,

Appellant,

vs.

CHARLES E. HUGHES, JR., ATTORNEY-GENERAL OF THE STATE OF NEW YORK, EDWARD SWANN, AS DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK, AND LEWIS NIXON, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, FIRST DISTRICT,

Respondents.

No. 1327

CHARLES E. HUGHES, JR., ATTORNEY-GENERAL OF THE STATE OF NEW YORK, EDWARD SWANN, AS DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK, AND LEWIS NIXON, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, FIRST DISTRICT,

Appellants,

vs.

CONSOLIDATED GAS COMPANY OF NEW YORK,

Respondent.

MOTION TO CONSOLIDATE AND DISMISS, AND AFFIDAVIT.

JOHN M. DAVIES,
Counsel for Consolidated Gas Company
of New York,
Now York City.

Supreme Court of the United States,

OCTOBER TERM, 1921.

CONSOLIDATED GAS COMPANY OF NEW YORK, Appellant, AGAINST CHARLES D. NEWTON, as Attorney-General of the State of New York, EDWARD SWANN, as District Attorney of the County of New York and LEWIS NIXON, constituting the Public Service Commission of the State of New York, First District, Respondents.	Nos. 258-288.
CHARLES D. NEWTON, as Attorney General of the State of New York, EDWARD SWANN, as District Attorney of the County of New York and LEWIS NIXON, constituting the Public Service Commission of the State of New York, First District, Appellants, AGAINST CONSOLIDATED GAS COMPANY OF NEW YORK, Respondent.	No. 257.

TAKE NOTICE, that on October 4, 1921, at the opening of court on that day, in the Supreme Court Room, Washington, D. C., the Consolidated Gas

Company of New York will move this Court, on the records of the above named cases, the annexed affidavit of Charles A. Vilas and on all the proceedings had in said cases:

1. For an order directing that cases Nos. 258 and 288 be heard concurrently with case No. 257, and that said cases be advanced for argument to such day as shall be set by the Court for the argument of No. 257.

2. For an order reassigning case No. 257 for argument upon November 14, 1921, or such other date as may suit the convenience of the Court.

3. And for such other and further relief as to the Court shall seem just and proper.

New York, September 24, 1921.

JOHN A. GARVER,
Counsel for Consolidated Gas Company,
55 Wall Street,
New York City.

To:

WILBER W. CHAMBERS, Esq.,
Counsel for Appellant Newton,

JOHN P. O'BRIEN, Esq.,
Corporation Counsel,
Counsel for Appellant Swann.

SUPREME COURT OF UNITED STATES.

OCTOBER TERM, 1921.

CONSOLIDATED GAS COMPANY OF NEW YORK, Appellant, AGAINST CHARLES D. NEWTON, as Attorney-General of the State of New York, EDWARD SWANN, as District Attorney for the County of New York, State of New York and LEWIS NIXON, constituting the Public Service Commission of the State of New York for the First District, Respondents.	Nos. 258 and 288.
CHARLES D. NEWTON, Attorney-General of the State of New York, EDWARD SWANN, as District Attorney for the County of New York, State of New York and LEWIS NIXON, constituting the Public Service Commission of the State of New York for the First District, Appellants, AGAINST CONSOLIDATED GAS COMPANY OF NEW YORK, Respondent.	No. 57.

STATE OF NEW YORK }
County of New York } :

CHARLES A. VILAS, being duly sworn, says:

1. I am an attorney-at-law associated with the firm of Shearman & Sterling, solicitors for the Con-

solidated Gas Company, complainant-appellee in cause No. 257 above and appellant in causes Nos. 258 and 288 above named, and am familiar with all the proceedings which have been had in these suits.

2. Cases Nos. 258 and 288 above named are appeals by the complainant below, Consolidated Gas Company of New York, from a portion of the amended final decree of August 11, 1920, and also from a modification of said final decree made on February 28, 1921. These appeals are cross-appeals in the same case as No. 257, and, under the Rules of this Court, should be heard at the same time. The two cases 258 and 288 raise the same question.

3. The appeal in case No. 257 is taken by the defendants below from a decree of the District Court of the United States for the Southern District of New York, dated August 4, 1920, and from an amended decree dated August 11, 1920, adjudging confiscatory and void as to the complainant the provisions of Chapter 125 of the Laws of New York for 1906, limiting the rate to be charged for gas in the Borough of Manhattan, City of New York, to 80 cents per thousand cubic feet. The amended final decree provided for the impounding with a Special Master or the securing by bonds of all moneys collected by the complainant in excess of 80 cents per thousand cubic feet, pending the decision of this appeal.

4. Case No. 257 was advanced for argument and set for October 10, 1921, by order of this Court made March 21, 1921, upon the motion of the defendants. The case is the first on the call of this Court for that day.

5. The record in this case comprises 21 volumes, containing 19,842 pages. The testimony occupies more than 16,000 pages and there are more than 1,000 exhibits. The trial before the Special Master began July 22, 1919, and ended March 30, 1920, after almost continuous daily sessions between those dates.

6. The appellants have filed 119 assignments of error in this case, and it is impossible for appellee to determine which ones are to be relied upon by them.

7. Upon the final hearing in the District Court, the solicitor for the principal defendant, the Attorney General of the State of New York, filed a printed brief containing 467 pages and 19 principal points. The Corporation Counsel of the City of New York, although it had been determined that he and the City of New York had no standing in the case (256 Fed. 238; 253 U. S. 219), later entered the case as solicitor for the District Attorney of the County of New York, and filed a separate printed brief containing 332 pages and 23 separate points.

8. The solicitor for the principal appellant, the Attorney General of the State of New York, in No. 257, has failed to serve any brief upon the solicitors for the appellee but has stated to me that the brief of the Attorney General is in process of preparation, but named no date when it will be served. The only brief that has been thus far served in behalf of any of the defendant public authorities is that of the Corporation Counsel, served on September 19, 1921, containing 385 pages and thirteen principal points.

9. The amount of money impounded, pursuant to the amended decree, now amounts to $9,716,524.09. The impounding continues until after the final decree of this Court, so that no rights or interests of consumers will be prejudiced by deferring the oral argument until the cases can be adequately briefed and the correllated appeals argued together.

10. The preparation of appellee's briefs has been begun and is well advanced; but it has been impossible to complete the same, or even to determine the contents thereof, in advance of receiving the appellants' brief, notably that of the principal party concerned, the Attorney General of the State of New York. It is literally an impossible physical task to prepare proper briefs and be ready to proceed with case No. 257 on October 10. In view of the size of the record, the probable size of the briefs to be filed by appellants, and the magnitude and importance of the questions involved, counsel for appellee will require the full time allowed by the Rules of this Court in which to prepare a brief covering the points to be made by the appellants. The preparation of the appellee's brief in case No. 257 has been further retarded by reason of the fact that William L. Ransom, who was principal trial counsel and made the oral argument in the Court below and will make the argument on the facts in this Court, became ill from pneumonia early in July, 1921, and was necessarily absent from his office and any attention to personal work until last week. Although he has now returned to his office, he has been and still is unable, under the advice of his physicians, to devote himself assiduously to the appellee's brief on the facts or to preparation for oral argument thereon.

11. The cases of Newton, Attorney-General, *v.* Kings County Lighting Company, No. 295, and Newton, Attorney-General, *v.* New York and Queens Gas Company, No. 296, pending in this Court and advanced for argument on October 10, 1921, involve the same questions as are involved in case No. 257, both of them being actions in equity to declare confiscatory and void Chapter 125 of the Laws of New York for 1906, which limits the rate to be charged for gas in various portions of the City of greater New York.

A motion is being made concurrently with this motion for the reassignment of New York and Queens Gas Company case for argument at the same time as the argument of No. 257; and I am informed and believe that a similar motion is to be made in No. 295.

The same counsel appear on both sides in the Consolidated Gas Company's cases (Nos. 257, 258 and 288) and the New York and Queens Gas Company case (No. 295); and the same counsel appear for the appellants in the Kings County Lighting Company case as appear for the appellants in the other cases mentioned.

12. The defendant Public Service Commission, First District, has, since these appeals were taken, been succeeded by a new Public Service Commission which has not been substituted as a defendant (Chapter 134, Laws of 1921). In other gas rate cases pending in the District Court, counsel for the new Commission resisted substitution, and, when complainant's motions for substitution were granted, he declined to appear at any of the hearings of the cases and repeatedly stated that the

Commission would not appear or take any part in the defense of any of the gas rate cases in the Federal Courts.

WHEREFORE, the Consolidated Gas Company of New York moves the Court to reassign for argument on November 14, or on such day as shall suit the convenience of the Court, case No. 257; and to consolidate cases Nos. 258 and 288 above named with case No. 257 and advance the same for argument upon the same day upon which No. 257 shall be assigned for argument; and for such other and further relief as to the Court shall seem just and proper.

CHARLES A. VILAS.

Sworn to before me this 24th day of September, 1921.

NOTARY PUBLIC, KINGS COUNTY
CLERK'S NO. 107 STF. No. 3008
N. Y. COUNTY CLERK'S NO. 9 REG. No. 3017